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No. 82-463

In the Supreme Court of the United States

October Term, 1982

WILLIAM J. McNEA *et al.*,
Petitioners,

vs.

GEORGE VOINOVICH, MAYOR, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ohio Supreme Court's decision, on a complete record following argument, that, as a matter of Ohio law, Cleveland's mayor did not grossly abuse his discretion by proposing to lay off fewer than three percent of Cleveland's police officers as a budget-balancing measure, denied petitioner police officers due process of law under the Fourteenth Amendment?

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STATEMENT OF THE CASE

Anticipating an $8.4 million deficit for fiscal year 1981 and required by law to maintain a balanced budget,[1] the Mayor of the City of Cleveland ("Cleveland"),[2] in late 1980, proposed a plan to lay off 184 City employees, including 53 police officers, to balance the budget. Fifty-two of the police officers were rookies who graduated from the Cleveland Police Academy in mid-December of 1980. At that time there were 1871 Cleveland policemen.

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1. *See* Ohio Revised Code Section 5705.39, Appendix at A4.

2. The City of Cleveland, its Mayor, George V. Voinovich, and numerous other City officials were sued and appear before this Court as Respondents. They are collectively referred to as "Cleveland." Separate Respondents Comfort and Nied represent a class of temporarily appointed City employees under Cleveland's Civil Service law, whom petitioners sought to have declared "illegal" employees. They are referred to herein as "new-party defendants."

Petitioners[3] filed this action in the trial court seeking to enjoin the proposed layoffs of the police officers on several grounds. The trial court ruled in favor of the union and granted the injunction. By its unanimous opinion and order of May 26, 1982, and its order of June 23, 1982, denying petitioners' motion for rehearing on the identical claim asserted in this Court,[4] the Supreme Court of Ohio reversed the judgment of the Court of Appeals and ruled in favor of Cleveland and the new-party defendants on all of petitioners' claims.

The petition for writ of certiorari arises from petitioners' claim that the proposed layoff of 53 of 1871 police officers was a gross abuse of discretion by the Mayor which jeopardized the health, safety, and welfare of the City.[5]

Cleveland and new-party defendants appealed to the Court of Appeals of Ohio, Eighth Appellate Judicial District.

Pursuant to Rule 9 of the Ohio Rules of Appellate Procedure[6] and Rule 4 of the Local Rules of the Eighth Appellate Judicial District of Ohio,[7] Cleveland and the new-party defendants both filed praecipes ordering the entire transcript to be included in the record on appeal. These praecipes stated that the record on appeal consisted of:

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3. Petitioners are William J. McNea and Paul Jurcisin, police officers and officers of the Cleveland Police Patrolmen's Association, and the union itself.

4. *See* Petition at 5.

5. Petitioners do not seek review of the Supreme Court of Ohio's construction of the Charter of the City of Cleveland.

6. Appendix at A5-A8.

7. Appendix at A9-A12.

1. Original papers and exhibits filed in the trial court and a certified copy of the docket and journal entries.

In addition the record will include:

2. Complete transcript under Rule 9(B).[8]

Pursuant to Rule 16 of the Ohio Rules of Appellate Procedure,[9] Cleveland filed its assignments of error, which included:

> 5. The trial court erred in enjoining the layoff of fifty-three patrol officers for lack of funds, in the absence of evidence in the record that such layoffs constituted a gross abuse of executive discretion.

This issue was fully briefed and argued in the Court of Appeals, which by order of May 14, 1981, affirmed the trial court in all respects.

Cleveland and the new-party defendants appealed to the Supreme Court of Ohio. The Supreme Court of Ohio took jurisdiction of the case by granting appellants' *motions that the record of the case be certified from the Court of Appeals to the Supreme Court.*[10] In accordance with Section 10 of Rule II of the Ohio Supreme Court's Rules of Practice,[11] the Court of Appeals transmitted the *complete record of the case*, including the complete transcript and all the papers in the case, to the Clerk of the Ohio Supreme Court. Also, as required by Section 1(E) of Rule V

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8. Cleveland's praecipe is reproduced in the Appendix at A2-A4. New-party defendants' praecipe was identical in all relevant respects.

9. Appendix at A13.

10. Appendix at A1. *See* O. Const., Article IV, Section 2(B), Appendix at A16.

11. Appendix at A20.

of the Ohio Supreme Court's Rules of Practice,[12] all of Cleveland's assignments of error filed in the Court of Appeals were set forth in the appendix to its brief on the merits.

One of the propositions of law proposed by Cleveland in its brief on the merits in the Supreme Court of Ohio was: "Layoffs of civil service employees necessitated by lack of funds and made in accordance with those charter provisions and civil service rules relating to layoff procedure may not be enjoined."

Petitioners (plaintiffs-appellees below) countered with the proposition that "the mayor of a charter city may be enjoined from laying off regularly appointed civil service employees *as a gross abuse of discretion* when such layoffs are not in accordance with the charter." (Emphasis added.)

In its Reply Brief in the Supreme Court of Ohio, the City responded that, in view of the City's undisputed financial straits, laying off fewer than three percent of the City's police force, including 52 rookies who had been on the streets for only a few days, "does not constitute the *gross* abuse of discretion which would warrant the trial court's stripping the Mayor of his vested authority. The courts below were wrong as a matter of law in enjoining the layoffs of the 53 police officers."

Some two months later, on March 3, 1982, the merits of this issue were argued by all parties before the Supreme Court of Ohio.

In its opinion, announced May 26, 1982, the Supreme Court of Ohio reversed the lower court's ruling on the abuse of discretion issue and held:

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12. Appendix at A24.

> As previously noted, the trial court found that the proposed layoffs of 53 police officers jeopardized the city's health, safety, morals, and welfare. As a matter of law, we cannot accept the trial court's conclusions regarding the effect of the proposed layoffs on the city's health, safety, morals, and welfare. The proposed layoffs contemplated removal of one experienced officer and 52 rookies who had recently completed training at the Police Academy. Appellants plausibly assert that "(f)or a municipality in virtual bankruptcy, the layoff of 53 officers * * * from a police force of 1871 does not constitute the *gross* abuse of discretion which would warrant the trial court's stripping the Mayor of his vested authority." We agree with appellants that the contemplated layoffs, which were predicated on the city's exigent financial circumstances, did not constitute a gross abuse of discretion. Unquestionably, the layoffs would have had an adverse effect on the police department's ability to serve the public. Nevertheless, the record does not support the conclusion that the negative impact of this relatively modest number of layoffs would have been so severe as to result in the "functional paralysis" of the police department envisaged by the trial court. (Emphasis in bold type added.)
>
> *McNea v. Voinovich* (1982), 70 Ohio St. 2d 117, 435 N.E.2d 420, reproduced in Appendix to Petition at A6, A7.

The court expressly noted that the rulings of the courts below appeared to be an attempt to evade its earlier holding in *Gannon v. Perk* (1976), 46 Ohio St. 2d 301, 313, 348 N.E.2d 342, 350 (*"Gannon II"*).

> The trial court's finding on the safety issue and the Court of Appeals' summary affirmance thereof is an expedient to avoid this court's holding in *Gannon II*, at page 313, that "the Charter of the City of Cleveland does not confer upon its safety forces a preferred priority over other civil service employees in the event layoffs are necessitated by reasons of economy." The rule of *Gannon II* is susceptible of evasion if trial courts routinely find that laying off safety personnel jeopardizes a community's health, safety, morals, and welfare.
>
> *McNea v. Voinovich, supra*, Appendix to Petition at A7.

Petitioners then filed a motion for rehearing, claiming that, in deciding the abuse of discretion issue, the Supreme Court of Ohio had deprived them of due process of law. That motion was unanimously overruled, and on June 23, 1982, the Supreme Court of Ohio issued its mandate reversing the judgment of the Court of Appeals in its entirety. On September 15, 1982, petitioners filed their petition for a writ of certiorari in this Court, which respondents received on September 20, 1982.

REASONS FOR DENYING THE WRIT

Few issues are so inherently a matter of state law as the standard of "gross abuse of discretion" of local officials. Yet, on the foregoing record, petitioners attempt to make a federal case out of this common law issue by asserting that they were denied their day in court. Nothing could be further from the truth, factually or legally. Moreover, proposed layoffs to balance Cleveland's *1981 budget* are as moot as moot can be.

1. Petitioners Suffered No Due Process Deprivation at the Hands of the Supreme Court of Ohio.

In their petition for writ of certiorari, petitioners assert that the Supreme Court of Ohio raised this issue *"sua sponte"* (at pp. i and 5), that the Court "had no record containing the evidence . . ." (at pp. 6, 10), and that the Court considered the issue "in the absence of a complete record" (at p. 12).

As respondents' Statement of the Case demonstrates, not only was the abuse of discretion issue briefed and argued in the Supreme Court of Ohio, but also the entire trial transcript was before that Court in the record of this case. This is in marked contrast to the cases cited by petitioners. None of those cases had a complete record. *In re Furnishings for Courtroom Two* (1981), 66 Ohio St. 2d 427, 423 N.E.2d 86 (no trial transcript or exhibits), *Beach v. Sweeney* (1958), 167 Ohio St. 477, 150 N.E.2d 42 (no trial transcript or exhibits), *Lynch v. Doran* (1968), 13 Ohio St. 2d 9, 233 N.E.2d 518 (only partial trial transcript), and *Ostrander v. Parker-Fallis* (1972), 29 Ohio St. 2d 72, 278 N.E.2d 363 (only partial trial transcript).

However, as petitioners candidly concede at page 10 of their petition, "the Ohio Supreme Court . . . can raise and determine errors in the record which they discover but which have not been specifically raised by appellants." Therefore, even if the City had *never* briefed or argued the issue, the Supreme Court of Ohio could properly have reached the identical result. As a matter of law, petitioners are charged with knowledge of that longstanding procedure of the Supreme Court of Ohio.

Long ago in *Chicago Ornamental Iron Co. v. Rook* (1915), 93 Ohio St. 152, 112 N.E. 589 (second paragraph of syllabus), the Court held "a cause properly in this court

is here for the determination of all questions presented by the record." That principle has frequently been pronounced by the Supreme Court of Ohio. *See Winslow v. Bus Co.* (1947), 148 Ohio St. 101, 73 N.E.2d 504, quoting *Rook* and citing three other Supreme Court cases.

As the Supreme Court of Ohio held in *Barsan v. Pioneer Savings & Loan* (1955), 163 Ohio St. 424, 127 N.E.2d 614, first paragraph of syllabus:

> 1. Where all the evidence considered by a trial court has been incorporated in a bill of exceptions, the Supreme Court can, without weighing the evidence, disregard the findings of the trial court on a particular factual issue if the evidence requires a different finding as a matter of law on such factual issue.

In the instant case, the Supreme Court of Ohio decided this common law issue *as a matter of law*. Petitioners had no federal constitutional right to expect a different result.

2. The Police Layoffs Proposed for Cleveland in January 1981 As a 1981 Budget-Balancing Measure Are Moot.

Obviously, the issue of the propriety of police layoffs to balance Cleveland's 1981 budget is moot. However, pursuant to the requirement of *Fusari v. Steinberg*, 419 U.S. 379, 95 S.Ct. 533, 42 L. Ed. 2d 521 (1975), Cleveland sets forth additional facts to confirm that mootness.

In late February of 1981 the voters of Cleveland increased the City's income tax rate from one and one-half percent to two percent. That obviated the necessity of laying off any police officers. The 1981 general fund budget was balanced by increased revenues. The financial

condition of the City of Cleveland in early 1981 is now history.

The layoff notices issued to the particular police officers in December of 1980 are now legal nullities. Some 250 new patrol officers have been appointed in the interim. Therefore, the fifty-three patrol officers who received the layoff notices challenged by petitioners are no longer the fifty-three patrol officers with the least seniority in their civil service classification. *See* Rule 8.20 of the Cleveland Civil Service Commission, Appendix A at A27, requiring employees with the least seniority in a particular civil service classification to be layed off first.

The particular police layoffs petitioners challenged never took place and with the passing of 1981 can never take place. The issue is moot.

CONCLUSION

As a matter of fact and law, petitioners had all the process they were due in the consideration of this Ohio common law issue. The complete record refutes petitioners' claim. Ohio appellate procedure was fully adhered to.

The proposed 1981 layoffs of police officers to balance Cleveland's 1981 budget are now moot.

Petitioners in fact won by tying up the layoffs in court.

This Court should not waste its time speculating on a common law issue which has become moot.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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